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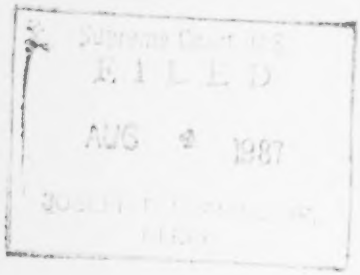

No. 87

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,

Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, AND SID E. WILLIAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

The lower court held in this Sherman Act conspiracy case that defendants' explicit combination to eliminate the petitioners from the profession of chiropractic education and limit consumer choice regarding available services was not "unreasonable" because, although petitioners would be eliminated from the market, the conspirators, constituting a majority of the profession, would continue to compete among themselves. The Court thus squarely held that Klor's Inc., v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) is "no longer good law" (R18-904). The court also held that respondents' private, exclusionary standard-setting conduct was wholly immune under the First Amendment from Sherman Act challenges. The

questions presented are:

1) Whether a horizontal agreement among dominant competitors to exclude other competitors from a market through predatory conduct, creating a concerted refusal to deal, is "reasonable" because some of the conspirators continue to compete among themselves and thus have not caused "actual anticompetitive effect in the relevant market"?

2) Whether a private conspiracy among professionals to eliminate competition with respect to services provided to consumers, precluding customer choice with respect to alternative services, is presumptively unreasonable under Federal Trade Commission v. Indiana Federation of Dentists, ___U.S.___, 106 S.Ct. 2009 (1986)?

3) Whether a conspiracy among professionals to exclude other competition through both lobbying and private standard-setting and other non-lobbying actions is wholly protected by the Noerr-Pennington doctrine and state action doctrine merely because state boards or legislatures subsequently refer to the conspirators' private standard setting organization in rules or statutes?

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CHIROPRACTIC et al.,

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v.

AMERICAN CHIROPRACTIC
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Sherman College of Straight Chiropractic (Sherman), and the Straight Chiropractic Academic Standards Association, Inc., (SCASA), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 27, 1987.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is reported at 813 F.2d 349. The opinion of the district court (App. B, infra) is reported at 654 F.Supp. 716. A supplemental opinion of the district court is also attached. (App. C infra). The judgment of the district court was entered January 9, 1986 (App. D infra).

JURISDICTION

The judgment of the court of appeals (App. E, infra) was entered March 27, 1987. Timely petitions for rehearing and for en banc consideration were denied by orders dated May 8, 1987, and May 18, 1987. (App. F & G, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2 (1976), provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of .....

STATEMENT OF THE CASE

1. Chiropractic, a professional health care service, was developed in 1895 by D.D. Palmer, who formulated the theory that the purpose of chiropractic was to correct subluxations (misaligned vertebrae that interfere with nerve

function). (R14-26-27). Palmer found that misaligned vertebrae can disturb nerve function, that this disturbance interferes with the body's striving to maintain its own health, and when misaligned vertebrae are realigned in order to relieve interference with nerve function, the body's ability to maintain its own health is enhanced (R14-30).

This concept of adjusting subluxations to relieve nerve interference is the traditional basis of the legal definition adhered to by most state laws on scope of practice of chiropractic -- so-called "straight" chiropractic -- and distinguishes chiropractic from the practice of medicine. The practice of medicine is traditionally defined as the diagnosis and treatment of disease. Practitioners

of chiropractic are traditionally not medical doctors and are not licensed by the respective states to practice medicine.

An alternative to straight chiropractic -- so-called "mixer" chiropractic -- has been developed and has grown within the chiropractic profession. The "mixers" generally purport to engage in medical diagnosis. Within the past fifteen years the "mixers" have achieved dominance within the profession after a period of coexistence. This litigation arose in response to the concerted efforts of the "mixers" to end coexistence and eliminate the traditional alternative offered by straight chiropractic.

At Petitioner, Sherman College, the chiropractic student is taught to inform

the patient that a chiropractor does not treat specific bodily ailments such as headaches, ulcers, diabetes, etc. The chiropractor informs the patient that the chiropractor deals only with the safe correction of subluxations; he engages in diagnosis only with respect to subluxation and the safety of giving an adjustment. The Sherman chiropractor, however, is trained in first aid and informs the patient of unusual findings that are outside the scope of chiropractic. The district court recognized that, "Sherman is clearly a substantial educational institution, dedicated to giving its students a quality chiropractic education," and that "Sherman's founder and president...[is] a person of high intelligence and integrity" (App. B, pg. 58a).

Utilizing the traditional "straight" chiropractic approach, Sherman teaches that chiropractic diagnosis and care are not an alternative to medical diagnosis and care of bodily diseases and ailments (R14-36). It is critical to public safety and consistent with state laws defining the practice of medicine that no patient be mislead or confused into thinking that the chiropractic adjustment is a specific treatment for any ailment or is a substitute for the medical doctor's diagnosing or treating a specific bodily problem.

2. By contrast, the accreditation standards of respondent Council on Chiropractic Education (CCE), a private standard-setting organization now controlled by the majority of chiropractic colleges and the

respondents, require that chiropractic colleges adhere to a "medical (mixer) objective" - purporting to teach chiropractic students to diagnose and care for all diseases and ailments to which the human body may be subject. The CCE excludes from membership and accreditation colleges like petitioner Sherman that do not adhere to such a medical objective. (R14-47; D. Ex. 29; P. Ex. 459).

CCE accreditation is critical to a chiropractic college's ability to compete with other chiropractic colleges, since the graduates cannot be licensed in thirty-nine states unless they graduate from a college accredited by the CCE.[1]

Fn. 1 is contained at the end of this petition because of its length.

3. Sherman's refusal to change to a medical objective sought by the majority of chiropractic colleges in violation of state laws defining the practice of medicine was the primary reason CCE refused to accredit Sherman in 1974 (R11-208-3; R14-112,113). In a letter to Sherman College in 1978. CCE reaffirmed its insistence that Sherman adopt a medical objective. (P. Ex. 53). Sherman chose not to, in effect, teach its students to engage in the unauthorized practice of medicine.

The CCE's insistence that colleges teach the practice of medicine to the exclusion of teaching chiropractic is embedded in the foreword to the CCE's Standards for Accreditation of Chiropractic Colleges, which is quoted in the trial court's January 9, 1986 order

(see App. B pg. 7a).

The former Executive Director of respondent National Board of Chiropractic Examiners (NBCE) admitted that the goal of the CCE and respondent American Chiropractic Association (ACA), a professional organization for chiropractors in the United States, was to have only one accrediting agency in the chiropractic profession in the United States, and to exclude any colleges that did not advocate the medical objectives embraced in the CCE standards (Holman Dep. pg. 90). The ACA also announced this goal in a written master plan. (P. Ex. 3)

A former officer of the CCE testified that it was his goal to "squelch" institutions like Sherman (P. Ex. 393; Webster dep. p. 203; R21-1200-1201), rather than permit their

continued coexistence.

The respondents communicated continuously and regularly among themselves concerning their efforts to limit the profession to the CCE medical concept and to exclude institutions like Sherman and its graduates. They jointly encouraged respondent NBCE to pass a resolution to allow only graduates of CCE schools to sit for the national examination. (P. Exs. 6, 40, 52, 161, 193, 330, 332, 344). They jointly urged the NBCE to have only faculty or administrators affiliated with CCE schools sit on the national test committees (Pl. Exs. 121, 354, 179, 222, 225, 231, 234, 235, 237, 238, 254; Holman dep. pgs. 57-62).

Respondents and others including representatives of other competing

chiropractic colleges, at a Task Force meeting sponsored by respondent ACA, affirmed their agreement that CCE should continue to exclude institutions like Sherman. The Task Force issued a report which stated in part:

> CCE should not weaken or dilute its present standards on diagnosis and should not admit to any CCE status, chiropractic colleges that do not meet such standards. (P. Ex. 132).

A former officer of the CCE and then president of the Federation of Chiropractic Licensing Boards (FCLB), a private organization of members of the chiropractic licensing boards of each state, asked those at the Task Force meeting to drive Sherman from the profession emphasizing that "this profession cannot allow such intrusion" (Webster dep. 192-193; P. Ex. 206).

After the Washington Task Force

meeting, the president of one CCE member college who attended wrote to the President of the ACA:

> I think that the conference on problems....with the straight element of chiropractic was most worthwhile and I look forward to other involvement in this task of defeating them....

(Pl. Ex. 203).

The President of the CCE wrote the NBCE declining to attend a meeting to discuss a resolution to exclude Sherman graduates from the NBCE examination. He said the CCE was sympathetic with the position but "we do not want to establish evidence of collusion regarding licensing matters." (Pl. Ex. 222).

The Chairman of the Commission on Accreditation of the CCE outlined to the FCLB and other affiliated groups ways by which Sherman was seeking to "circumvent" the CCE. He stated that the CCE had a

"proprietary interest" in its standards and that any circumvention of CCE standards must not be allowed. (Pl. Ex. 45, 112, 219, 174 and 304).

4. The CCE standards were created by the college members of the CCE. That action was financially, not educationally, motivated, and was not based on studies or data (P. Ex. 8). Chiropractors who are taught according to the CCE standards that they must diagnose and care for the body in health and disease, by definition, perform more patient services and therefore increase revenue.

As a result of the foregoing exclusionary conduct, petitioner Sherman cannot attract chiropractic students in sufficient number to remain in business.

Respondents presented to the United

States Department of Education (USDE) false testimony that the CCE accredited colleges like Sherman and did not impose upon the colleges a medical objective. (Tr. Trans. vol. 10. pg. 1321-22) The CCE presented the false testimony because the USDE would not recognize CCE if CCE excluded an important approach to chiropractic as that taught at Sherman.

In March, 1979, the USDE wanted evidence that CCE would accredit colleges like Sherman. Prior to that hearing, the CCE had adopted a resolution directing another college to show proof that it published in its bulletin that it taught the diagnosis and care of the human body in health and disease (medical objective). (P. Ex. 358) At the time of this resolution that college was applying for accreditation by CCE.

Despite requiring that college to publish this statement, the CCE had the president of that college testify to the USDE that the CCE allowed for straight colleges and did not force chiropractic colleges to adhere to a medical (mixer) objective. The purpose of the testimony was to mislead the USDE into thinking the CCE accredited schools like Sherman. (P. Ex. 449)

The chairman of the Commission on Accreditation of the CCE also falsely testified to USDE that the CCE allowed diverse philosophies with respect to the scope of practice. (P. Ex. 449).[2]

---

2. This same person on behalf of CCE had previously stated CCE had a "proprietary interest" in its standards and that Sherman should not be allowed to "circumvent" those standards. The testimony of the President of Life College and the testimony of the Chairman of the Commission on Accreditation were

Further, after returning from testifying before the USDE, the president of that college stated to an assembly of his faculty and student body the following about his testimony:

> Now I want you to realize that we are not 100% happy with the verbage of the CCE's approach to chiropractic, for it does and it's true that it does smack of being a medical doctor in that we diagnose to determine the disease and then turn around and specifically apply an adjustment to treat that disease...
>
> I thought [at the USDE hearing] we didn't come into the fact that we don't treat diseases because CCE seems to think we do treat diseases. (P. Ex. 447).

Fn. 2 continued: in direct conflict with the resolution passed by the CCE comanding Life College to publish proof of its adherence to the CCE concept, (P. Ex. 449): in conflict with the article published by the president of Life College in July/August 1979; and in conflict with CCE's communications with Sherman College.

5. Petitioners claimed in their complaint that respondents conspired to restrain trade within and monopolize the chiropractic education and chiropractic care markets by preventing the plaintiffs and others from pursuing "straight"[3] chiropractic and forcing the mixer medical objective in violation of state laws defining the practice of medicine. (R14-43,44).

---

3. The trial court used the term "anti-diagnostic" as synonymous with the term "straight." For purposes of this petition it is of no legal significance whether the petitioners are referred to as "straights" or "anti-diagnostics", and it is of no legal significance whether the respondents are referred to as "mixers" or "pro-diagnostics." The importance of the distinction between the two groups is that petitioners define chiropractic according to the traditional definition under state laws on the scope of the chiropractic. The respondents, by contrast, define chiropractic to bring the health care service within the state law definition of the practice of medicine.

Such exclusionary conduct precluded customers from choosing the traditional alternative of "straight" chiropractic services and amounted to the elimination of competition between "straights" and "mixers".

It is common for state licensing laws to require candidates for licensure to be graduates of colleges accredited by federally recognized specialized accrediting agencies. Accreditation organizations in America are private rather than govermental. Petitioners have contended that membership in them should be voluntary and the function of the accreditation organization is to evaluate the degree to which a college meets its own objectives. It should not be a function of accreditation to dictate what the objectives of a college should

be, provided the objective falls within the legal limits of the profession. (R17-743-63).

6. At the conclusion of the trial the Court stated orally that Klor's, Inc. v. Broadway Hale Stores, Inc. 359 U.S. 207, 79 S.Ct. 705 (1959) was no longer good law (R18-904). Based upon this view, in its final written order the court held that the defendants' conspiracy to boycott Sherman College from competing with the CCE accredited colleges had no anticompetitive effect. (App. B) Notwithstanding this conclusion, the trial court acknowledged that "the [defendants]...achieved dominance in the profession...through the sponsorship of the ACA,"...that "[i]n 1971 ACA formed ...CCE...and backed CCE financially," and that CCE refused to

accept Sherman College because of Sherman refused to subscribe to defendants' philosophy. (App. B pg. 6a - 7a). Also, despite its explicit recognition that CCE colleges compete with boycotted colleges like Sherman, (App. B pg. 18a), and despite its explicit finding that in the wake of the boycott, "the fortunes of the anti-diagnostic chiropractic colleges [had] declined"; and that "[t]he enrollment of Plaintiff Sherman College [had] not grown at a time when enrollment at pro-diagnostic institutions [was] increasing" (App B, pg. 14a), the trial court held that the boycott had no anticompetitive effect because the number of CCE colleges had increased, (App. B pg. 18a).

Apparently recognizing the adverse impact of the boycott upon the ultimate

consumer, the trial court acknowledged Sherman's contention that "graduates of anti-diagnostic colleges provide chiropractic services different in kind (and cost) than those provided by graduates of the pro-diagnostic colleges," that "the public will be bilked, ...and that where diagnosis results in a reference to a medical doctor, that any diagnostic procedure will surely be repeated, resulting in a double charge to the patient." (App. B, pg. 22a).

The court also stated:

> Plaintiffs' claims also fail for another reason... Defendants' activities.... are immunized from liability under the Noerr-Pennington doctrine and under the related immunity established for state action in the Parker v. Brown doctrine....(App. B, pg. 20).

7. The court of appeals affirmed,

per curiam, adopting the district court opinion, and denied a petition for rehearing, even though this Court decided Federal Trade Commission v. Indiana Federation of Dentists, ___U.S.___, 106 S.Ct. 2009 (1986), after the district court's decision, but before the appellate court's decision.

REASONS FOR GRANTING THE PETITION

This Court should review the lower court's decision in this case because: (i) it conflicts with long-standing precedent in this court and lower courts regarding the illegality of group boycotts; (ii) it ignores the contradictory holding regarding the rule of reason in FTC v. Indiana Federation of Dentists, supra.; (iii) it is in direct conflict with a recent decision of the Second Circuit and the amicus position of

the United States regarding the reach of the Noerr-Pennington doctrine and the state action doctrine; and (iv) it concerns issues of substantial importance regarding professional self-regulation.

1. A horizontal agreement designed to exclude competitors from a market through a concerted refusal to deal always has been considered a Sherman Act violation notwithstanding that the conspirators continue to compete among themselves and, therefore, there is no obvious anticompetitive effect throughout a defined market. This Court has repeatedly held as much in all of its boycott decisions. See, eg., Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959); Fashion Originator's Guild of America, Inc., v. FTC, 312 U.S. 457, 61 S.Ct. 703 (1941);

Radiant Burners Inc., v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); U.S. v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321 (1966).

This Court recently reaffirmed Klor's, at least, as in this case, where the defendants have substantial market power --perhaps eliminating the rigid distinction between the per se rule and the rule of reason. In Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co., ___U.S.___, 105 S.Ct. 2613 (1985), the Court noted:

> "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that the expulsion is virtually always likely to have an anticompetitive effect is not warranted. See L. Sullivan, Law of Antitrust 292-293 (1977); Brodley, 95 Harv. L. Rev., at 1563-1565."

105 S.Ct. at 2621. The opinion of the

trial court in the case at bar expressly states that defendants had both market dominance and control of essential elements - national testing and accreditation. (App. B)

The lower court's contrary decision in this case also conflicts with recent decisions of other circuits: Va. Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476 (4th Cir. 1980), cert. denied, 101 S.Ct. 1360; (Holding anticompetitive a rule requiring psychologists to submit bills through psychiatrists. The Fourth Circuit stated: "Forewarned by the decision in National Society of Professional Engineers, supra, that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not

inclined to condone anticompetitive conduct upon the incantation of good medical practice; at pg. 485); Wilk v. American Medical Assn., 719 F.2d 207 (7th Cir. 1983), cert. denied 104 S.Ct. 2399; (Holding that chiropractors compete with medical doctors, that defendants must show their restraints are the least restrictive, and are justifiable only for specific patient safety as opposed to a general public safety); and U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (Holding that the standards of a multilist company which had the effect of excluding some realtors from membership were anticompetitive and overly restrictive).

In a recent article; "The Rule of Reason - A Catechism On Competition" 55 Antitrust Law Journal 571, Professor

Phillip Areeda responded to the question: "How do we determine whether competition is unreasonably restrained?" Through reference to United States v. Realty Multi-List Inc., 629 F.2d 1351 (5th Cir. 1980); FTC v. Indiana Federation of Dentists, 106 S.Ct. 2009 (1986); NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948 (1984); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); and Northwest Pacific Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S.Ct. 2613 (1985), Professor Areeda pointed out that the Court may first determine whether the activity has an anticompetitive effect. Alternatively, the court may determine whether defendants had an anticompetitive purpose. Finally, the Court should

determine whether the restraint is the least restrictive. This approach suggested by Professor Areeda is a shorthand analysis of this Court's holdings in NCAA, supra, and Indiana Federation of Dentists, supra.

Moreover, this Court's rule of reason analysis in those cases is consistent with that in its prior boycott Sherman Act cases. See, eg. Ponsoldt, "The Application of Sherman Act Anti-Boycott Law To Industry Self-Regulation: An Analysis Integrating Non-boycott Sherman Act Cases," 55 S.Calif. L. Rev. 1. Other circuits obviously agree: Va. Academy of Clinical Psychologists v. Blue Shield of Va., supra; Wilk v. AMA, supra; U.S. v. Realty Multi-List, Inc., supra. The evidence in this case and the court's own order show

(1) an anticompetitive purpose, (2) an anticompetitive effect (in that certain forms of competition were eliminated) and (3) that the CCE's standards and defendants' other exclusionary practices were not the least restrictive. In short, there is no justifiable reason for the defendants' intended exclusionary result.

The court, however, excused one defendant, ACA, for having "good intentions." (App. C). The Court so ruled despite uncontroverted evidence of ACA's efforts to prevent graduates of Sherman from taking the NBCE exam, despite ACA's agreements with the CCE that Sherman not be accredited unless it advocated the CCE-ACA allopathic medical concept of chiropractic; despite the

uncontroverted testimony that the respondents were out to exclude any colleges that did not advocate the objective stated in the foreword to the CCE standards (Holman Dep. pg. 90); and despite the uncontroverted evidence that the ACA sponsored a task force meeting attended by ACA officials, NBCE officials, and member colleges of the CCE, to determine how to eliminate colleges like Sherman from the profession.

The court held that the admitted combination was "reasonable" because there was no evidence that it diminished competition throughout the defined relevant market: the number of chiropractic colleges (most of which participated in maintaining the exclusionary CCE standards and other

boycott activity) had increased. In other words, according to the court, the greater the participation in a combination designed to eliminate certain forms of competition, the less likely is that combination to be deemed "unreasonable." Such logic undermines the very foundation and goals of the antitrust laws which, among other things, are to disperse economic power and maintain economic opportunity to promote an ongoing efficient competitive process, thereby enhancing consumer welfare.

To underscore its radical departure from the rule of law established by this Court, the lower court announced that Klor's Inc., v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959) is no longer good law, (R18-904) and virtually ignored Northwest Wholesale

Stationers Inc. v. Pacific Stationary & Printing Co., ___U.S.___, 105 S.Ct. 2613 (1985) and United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

2. Petitioners contended that respondents' conduct should be deemed unreasonable under the Sherman Act not only because it was an intentionally exclusionary boycott but also because it was an agreement among competitors not to compete with respect to alternative services provided to consumers: the defendants specifically agreed that they would not compete for business by offering "straight" (and therefore less "comprehensive") chiropractic services. Their motive obviously was to expand the services they provided into the practice of medicine and thereby enhance revenues.

The lower court held that this intentional agreement not to offer, or allow others to offer, "straight" chiropractic to consumers was not unreasonable because there was no decrease in the number of chiropractors and chiropractic colleges throughout the market. In other words, the Court measured "competition" by the overall number of competitors, not by the types of services offered to consumers.

Such a holding directly conflicts with FTC v. Indiana Federation of Dentists, supra, decided after the district court's opinion but before that of the court of appeals. In Indiana Federation of Dentists, this Court held:

> The Federation's collective activities resulted in the denial of the information the customers requested in the form

> that they requested it, and forced them to choose between acquiring that information in a more costly manner or foregoing it altogether. To this extent, at least, competition among dentists...was restrained.

106 S.Ct. at 2017.

It is apparent that the court of appeals has chosen to disregard Indiana Federation, which was at the heart of petitioners' appeal to that court regarding the test of "reasonableness" under the Sherman Act.

3. The holding of the court below that the exclusionary accreditation standards of the CCE and efforts to create those standards became protected lobbying under the Noerr-Pennington doctrine and state action doctrine is in direct conflict with Indian Head, Inc. v. Allied Tube & Conduit, ___F.2d.___,1987-1 Trade Cases paragraph 67,547 (2nd Cir.

1987), with the amicus position of the United States as recently presented to the Second and Ninth Circuits, and with this Court's application of the Noerr-Pennington Doctrine.

In ruling in favor of the defendants, the lower court did not find insufficient evidence of a conspiracy to exclude Sherman College. What the court held was that even if the defendants' conspiratorial activities which exclude Sherman had been unreasonable, "[p]laintiffs' claims also fail for another reason" (Jan 9, 1986 Order p. 13) - that defendants activities were "immunized from liability under the Noerr-Pennington doctrine[4] (Jan. 9, 1986 Order p. 13).

With respect to the

4. The district court briefly referred also to the "state action"

Noerr-Pennington doctrine, the court discussed that it did not think the sham exception or co-conspirator exception to the doctrine were applicable to the facts in the case. The court did not consider whether the Noerr defense should apply in the first place to protect the respondents' broad range of activities. It did not discuss the elements of the Noerr-Pennington doctrine which a defendant must prove in order to raise the lobbying defense. It did not discuss

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Fn. 4 continue: doctrine established by the Court in Parker v. Brown, 317 U.S. 341 (1943). However, the court's opinion fails to address the doctine separately except by brief reference, and fails to attempt to apply the "two pronged" test in Southern Motor Carriers Rate Conference v. U.S., ___ U.S. ___, 105 S.Ct. 1721 (1985) to the facts of this case. Thus, it would appear that in fact, the court did not rely on the doctrine.

the fact that the CCE standards and numerous other boycott activities were anticompetitive and were not lobbying.

The trial court gave Noerr-Pennington immunity to the CCE standards and underlying conduct leading to the standards, which were promulgated by competing private chiropractic colleges, simply because CCE accreditation status was relied upon in the regulations and statutes of state boards and legislatures. This application of the Noerr-Pennington doctrine is in direct conflict with the recent opinion of Judge Lumbard of the Second Circuit in Indian Head, Inc. v. Allied Tube & Conduit Corp., ___F.2d___, 1987-1 Trade Cases paragraph 67,547 (2nd Cir.1987). Nothwithstanding the expansive role of private professional

standard-setting organizations, the Second Circuit held that proper and consistent development of the law should reject Noerr immunity for standard-setting and non-lobbying practices of such organizations.

As stated in a recent law review article written by a senior staff attorney for the Federal Trade Commission, there are two reasons why the Eleventh Circuit's unexplained expansion of Noerr immunity to private standard-setting and private conduct of private professional groups is unsound:

> First, although it has never expressly decided the issue, the Supreme Court has reviewed cases involving efforts to influence private standards-setting organizations and has not held such conduct immune. For example, American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp. and Radiant Burners, Inc. v. Peoples Gas Light & Coke

Co., both held that the activities of private standard-setting organizations fall within the antitrust laws. In each, the antitrust plaintiff claimed that arbitrary or unfairly reached organizational decisions restrained competition and harmed him. Nonetheless, the Court neither declared any general policy of immunity for the organization or its dominant members nor considered whether there was sham petitioning; instead, the Court simply applied the principles of competition policy directly. The disposition of these cases is consistent with the dicta in lower court cases that Noerr "immunizes only those actions directed toward govermental agencies or officials.

Second, professional and standards-setting organizations are not governmental within the rationale of Noerr. Neither an organization's membership nor its leadership is elected by or answerable to the body politic. Although some organizations may seek to advance the public interest, it is the industry's or profession's conception of the public interest that they promote...

Hurwitz, "Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr " 74 Geo. L.J. 65, at 91 (1985).

In its appeal to the United States Court of Appeals to the Eleventh Circuit in this case, petitioner Sherman emphasized that the hallmark of defendants' antitrust violation was the anticompetitive standards of the CCE (and collusive behavior underlying those standards) which are not even arguably protected lobbying under the Noerr-Pennington doctrine. Plaintiffs submitted to the Eleventh Circuit copies of the Amicus Curiae briefs filed by the United States Department of Justice and the Federal Trade Commission in Indian Head, Inc. v. Allied Tube & Conduit Corp., ___F.2d___,1987-1 Trade Cases

paragraph 67,547 (2nd Cir. 1987); and in Sessions Tank Liners, Inc., v. Joor Manufacturing, Inc., et al., Nos. 86-6208, 86-6470 (9th Circuit), which argued the exact point of law - that Noerr-Pennington immunity does not apply to private standard setting activity.

The Eleventh Circuit refused to consider the briefs and returned them to counsel saying they were inappropriate authority.

Soon thereafter, on March 27, 1987, the Eleventh Circuit entered its per curiam affirmance of the lower court's opinion. This per curiam decision is in direct conflict with the subsequent April 22, 1987 written opinion of Judge Lumbard in Indian Head, supra. Adopting the amicus position of the United States, the Second Circuit held:

> We decline Allied's invitation to extend Noerr-Pennington immunity to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA...
>
> As the Supreme Court stated in Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985), '[w]e may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf

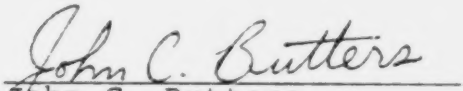
1987-1 Trade Cases at pgs. 60,315 and 60,316.

Nearly identical efforts of a professional organization to expand Noerr-Pennington immunity were also recently rejected by the Third Circuit opinion of Chief Judge Gibbons, in Pa. Dental Ass'n. et al. v. Medical Services Ass'n of Pa., et al., 815 F.2d 270 at 277 (3rd Cir. 1987).

CONCLUSION

Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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FOOTNOTES

[1]Although most states, by statute or board rule, require graduation from a CCE accredited college to be eligible for licensure, the CCE's standards which require the colleges to teach the medical objective are inconsistent with the state statutes defining the scope of practice of medicine and statutes defining the scope of chiropractic.

Recently, the Georgia Office of the Attorney General clearly pointed out that chiropractors are limited to straight chiropractic and that the statutory provision requiring graduation from a CCE accredited college cannot be viewed as legislative authorization of the mixer form of chiropractic. In pertinent part in Op. Atty. Gen. 34-53, the Georgia Attorney General in August, 1984 stated the following in response to an inquiry from the State Examining Board:

> In 1978, the General Assembly amended the Chiropractic Practice Act to require licensees to have graduated from a chiropractic college having status with the Council on Chiropractic Education (CCE) or a college having equivalent standards. (1978 Ga. Laws, p. 2050.) This change, however, did not expand or broaden the scope of practice of chiropractic in the State of

Georgia ...[T]he teachings of approved chiropractic schools are not controlling because the practice of chiropractic is subject to the control of the legislature. See Bauer v. State, 227 S.E. 2d 195 (Ga. S.Ct. 1976).

It is recognized that the public can obtain vitamins and nutritional supplements from various retailers, including health food stores. However, the retailer does not hold himself out as being engaged in the practice of one of the healing arts. Chiropractors, on the other hand, do so hold themselves out and are subject to the restrictions placed on the practice of chiropractic by the Chiropractor Practice Act. O.C.G.A. Sections 43-9-1 and 43-9-16.

With respect to the allegations of Sherman College in the present case the trial court stated erroneously that "the parties did not address the issue of whether the administration of general diagnostic tests by chiropractors would or does violate scope of practice violations in the various states" (Order, p 7,A.7). To the contrary, this issue was addressed by plaintiffs in numerous briefs to the trial court, and the trial court refused to admit into evidence copies of state statutes on scope of practice (Tr. vol. 6. pg. 887-890).

The following is representative of state laws on scope of chiropractic:

In Attorney General v. Beno, Mich. Ct. App. Docket No. 61368 (1983), (Apendix B to Brief of Plaintiffs-Appellants in Sherman College of Straight Chiropractic Association, et al, Eleventh Circuit, No. 86-8226) the court rejected the argument that chiropractors should be permitted to engage in general medical diagnosis to determine problems untreatable by chiropractic. In part the Court in Beno, said:

> "...[A] chiropractor is not trained in discerning abnormalities in a patient's heart and lungs, or in interpreting a urinalysis report. If a chiropractor is concerned about the patient's general physical condition, he should refer the patient to a physician trained in such matters.
>
> It is true, as defendant notes, that many of the differential diagnostic techniques are not, in and of themselves, dangerous to the patient. However, the potential harm occurs because the patient may be led to believe that the chiropractor

> is capable of detecting health ailments unrelated to the spine. Thus, the patient may believe that no other physical problems exist and may fail to seek appropriate medical care."

at pgs. 5-6.

"Chiropractic" has been defined as the detecting and correcting of subluxations by adjustment of the spinal vertebrae by manipulation. 16 ALR 4th 58, 62-63; 61 Am. Jur. 2d Physicians, Surgeons, and other healers section 5.

Licensed chiropractors lack authority to diagnose for other than the limited purpose of determining whether the patient is suffering from a condition for which chiropractic is an appropriate method of treatment. See, People v. Machado, 99 Cal. App. 702, 279 P. 228 (1929) which upheld a conviction of practicing medicine without a license of a chiropractor who diagnosed a child's condition as pneumonia.

The court in Howe v. Smith, 203 Pa. Super 212, 199 A.2d 521 (1964) held that chiropractors were not authorized to engage in the general diagnoses of diseases. The decision in Howe, supra, was followed in Commonwealth Dept. of

Transp. Hearing Board v. Pennsylvania Chiropractors Society, 22 Pa. Cmwlth. 483, 349 A.2d 509 (1976) where the Court rejected a contention that general diagnosis authority was conferred by a statutory amendment which permitted chiropractors to engage in "chiropractic diagnosis".

In Kuhl v. Arkansas State Board of Chiropractic Examiners, 236 Ark. 58, 364 S.W.2d 790 (1963), the Court held that licensed chiropractors who indicated that they could diagnose many diseases, including cancer by urinalysis were engaged in the unlawful practice of medicine.

The Court in Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, 549 S.W.2d 817 (1977) held that chiropractors were not permitted to utilize the services of medical laboratories for diagnostic purposes. The Court said that the statutory definition of chiropractic as the science of locating and adjusting subluxations did not authorize the collection of human specimens for submission to a medical laboratory.

In ordering that chiropractor who took throat cultures and urine samples from his patients be bound over to stand trial on a charge of practicing medicine without a

license, the court held in People v. Bovee, 92 Mich. App. 42, 285 N.W.2d 53 (1979) that such diagnostic procedures did not come within the pre-view of a statute that authorized the practice of chiropractic, which was defined to include the manual adjustment of misaligned or displaced spinal vertebrae, and procedures preparatory to such an adjustment. Although it was contended that the use of throat cultures and urine samples for analytical purposes was necessary in order to determine whether patients were suffering from ailments that were amenable to chiropractic treatement, the court said that it failed to see how the use of such procedures would reveal the existence of misaligned or displaced vertebrae. It did not believe, the court said, that the legislature intended to authorized chiropractors to employ general diagnostic techniques, but only those techniques that might reveal the existence of problems that were treatable by chiropractic.

Diagnostic laboratory services and diagnostic X-rays of bodily portions other than the spine ordered or performed by a chiropractor were not within the scope of chiropractic as established by statute, the court held in Cotter v Blue Cross & Blue Shield 94 Mich. App. 129, 288 N.W.2d 594 (1979), and thus were

properly excluded from coverage under the terms of the subscribers' contract with Blue Cross and Blue Shield. Under the provision of the insurance contract pertaining to reimbursement for services rendered by physician to the extent that he rendered services he was legally qualified to perform under the chiropractic statute. Stating that the key issue was whether or not chiropractors were authorized under the statute to perform the services the insurer wished to exclude from coverage, th court, citing People v. Bovee, 92 Mich App 42, 285 NW2d 53 (1979), stated that such diagnostic services were not within the scope of chiropractic as defined by statute. Thus, a chiropractor performing the services did not fall within the contract definition of "physician," the court said, ad the insurer was not obligated under the contract to pay for their services.

In Spunt v. Fowinkle, 572 S.W.2d 259 (1978), an appellate Court in Tennessee held that diagnostic procedures including drawing and analyzing blood, making Pap smears, and giving complete physical examinations was the unlicensed practice of medicine.

The Court in State v. Wilson, 11 Wash App. 916, 528 P.2d 279 (1974) upheld an injunction prohibiting a licensed chiropractor

from taking blood samples for diagnostic purposes.

In upholding the revocation of a chiropractor's license, the Court in In Re Stockwell, 28 Wash. App. 295, 622 P.2d 910 (1981) held that the use of urinalysis to diagnose cancer was beyond the scope of chiropractic. See also, Bauer v. State, 227 S.E.2d 195 (1976) which forbade the use of diagnostic devices. See generally, 16 ALR 4th 58.

APPENDICES

APPENDIX

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; Straight Chiropractic Aademic Standards Association, Inc., a Pennsylvania Corporation, Plaintiffs-Appellants.

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., the Council on Chiropractic Education, Inc., National Board of Chiropractic Examiners, and Sid E. Williams, Defendants-Appellees.

No. 86-8226.

United States Court of Appeals, Eleventh Circuit.

March 27, 1987.

Appeal from the Untied States District Court for the Northrn District of Georgia; Orinda D. Evans, Judge.

Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior Distirct Judge.

PER CURIAM:

Oral argument was heard in this case in Atlanta, Georgia on November 19, 1986. The record, briefs, and arguments of counsel have been carefully considered. The judgment of the district court is affirmed on the basis of the order of the Honorable Orinda D. Evans, dated and filed January 9, 1986, published as Sherman College v. American Chiropractic Association, Inc. ___F.Supp.___(N.D.Ga.

1987).

*Honorable Seybourn H. Lynn, Senior U.S. District Judge for the Northern Distirct of Alabama sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., WILLIAM SUKOVITCH and MICHAEL KUDLAS	:	
vs.	:	Civil No. C81-1767
AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS	:	

ORDER

This antitrust action is brought under §§4 and 16 of the Clayton Action, 15 U.S.C. §§ 15 and 26, to redress injuries allegedly sustained by Plaintiffs Sherman College of Straight Chiropractic ("Sherman College") and Straight Chiropractic Academic Standards Association, Inc. ("SCASA") as a result of Defendants' violations of §§1 and 2 of

the Sherman Act, 15 U.S.C. §§1 and 2. The case is before the court for findings of fact and conclusions of law, having been tried without a jury in March of 1985.

Findings of Fact

The evidence presented at trial-- especially the documentary evidence-- was voluminous. Nonetheless, most of the facts are undisputed and in any event are not as complex as the length of the record might indicate. The court's findings of fact are as follows:

Plaintiff and Defendants respectively are adherents of two different schools of thought within the chiropractic profession. Defendants assert that chiropractors should be primary health care providers who diagnose disease, in addition to

performing spinal analysis and manipulation. Therefore, Defendants believe that chiropractic education should include training in general diagnostic procedures. They contend the public is better served when chiropractors can identify possible medical problems and if necessary refer the patient to another health care provider. Plaintiffs, on the other hand, assert that chiropractors should limit themselves to procedures associated with identifying and correcting misalignments of the spinal vertebrae. They contend that chiropractors lack the broad medical education necessary to effectively diagnose medical ailments, and that the administration of diagnostic tests by chiropractors for possible referral purposes is dangerous and imposes

needless charges on patients. Both Plaintiffs and Defendants agree that correcting vertebral misalignments contributes in a significant way to the human body's ability to maintain health.

Over the past ten to fifteen years, the pro-diagnostic forces have achieved dominance in the profession. This has occurred to a great extent through the sponorship of Defendant American Chiropractic Association, Inc. ("ACA"), the primary professional organization for chiropractors in the United States. In 1971 ACA formed Defendant Council on Chiropractic Education, Inc. ("CCE") as a specialized accrediting agency for chiropractic colleges. Since then, ACA has backed CCE financially. CCE will only accredit chiropractic colleges which subscribe to the pro-diagnostic

philosphy. Mainly for this reason, CCE declined to grant accreditation to Sherman College in 1974.

CCE's Educational Standards and Policies assign central importance to training future doctors of chiropractic in the skills of performing a diagnosis. The foreword to the standards states:

> The purpose of professional education is to prepare the doctor of chiropractic as a primary health care provider. As a portal of entry to the health delivery system the chiropractic physician must be well educated to diagnose, including, but not limited to, spinal analysis, to care for the human body in health and disease, to consult with, or refer to, other health care providers. It is this concept of the chiropractic physician which serves as a basis for interpretation of the Educational Standards for Chiropractic Colleges.

CCE's standards and policies require chiropractic students to be taught, both

by didactic and clinical means, to perform a full body screening examination, using a patient history, physical examination, and appropriate diagnostic aids, which may include x-rays and laboratory tests. See Defendants' Exhibit 29, "Educational Standards for Chiropractic Colleges," Sec. III, pp. 17 and 23, and Sec. IV, pp. 17-19. While this diagnostic examination apparently differs in certain respects from an examination of a medical doctor, it must be sufficient at least to identify the existence of an abnormality in any part of the body. See Defendants' Proposed Findings of Fact, p. 24. According to CCE standards, the purpose of the examination is not solely to prepare the way for chiropractic treatment, but also to identify any need for consultation

with or referral to medical doctors and other practitioners within the general health care system. Id.

Through lobbying efforts, ACA and CCE have persuaded most states to permit only graduates of pro-diagnostic schools to become licensed chiropractors. In some states this has required legislative action, but in most states chiropractic licensing boards have done this by regulation. One form of such regulation states that only graduates of institutions accredited by CCE may apply for licensure. Other regulations are worded differently, but in application most operate to exclude graduates of antidiagnostic colleges. For example, some states allow licensure only to graduates of schools "accredited by an agency recognized by the U.S. Department

of Education." CCE is the only accrediting agency for chiropractic schools which has ever applied for or obtained recognition from the U.S. Department of Education.

At relevant times, ACA and CCE have had a close relationship with the Federation of Chiropractic Licensing Boards ("FCLB"), an organization to which all members of state licensing boards belong. Representatives of these three organizations have held joint meetings to discuss various matters of mutual interest, including problems created by the non-conforming anti-diagnostic colleges. For example, at the request of CCE in 1974, FCLB passed a resolution urging members of the state licensing boards to require graduation from a CCE-accredited institution as a condition

of licensure. Additionally, a number of individuals served in leadership positions in more than one of these organizations, sometimes simultaneously.

The court infers that most state chiropractic licensing boards were predisposed to grant requests by CCE and FCLB to permit only graduates of pro-diagnostic institutions to become licensed chiropractors. This is clear from the fact that in 1974 FCLB--whose general membership consists of the state licensing boards and board members--passed the recommendation urging the state boards to allow licensure only to graduates of pro-diagnostic institutions. This was at the time when ACA and CCE began their campaign to lobby the state boards. Also, the fact that ACA has undertaken such aggressive,

continuing efforts to promote pro-diagnostic philosophy reflects the existence of a broadbased commitment by the profession to that philosophy. Therefore, it is clear that in addressing the chiropractic members of the licensing boards on this subject, ACA and CCE were--if not actually "preaching to the converted"--addressing a very receptive audience. However, there is no evidence that any agreements were reached or any commitments made prior to the public hearings which were held by the various boards on limitation of licensure. Insofar as the record reflects, formalities and proper procedures were observed.

Both CCE and FCLB sought the enactment of various CCE requirements by Defendant National Board of Chiropractic

Examiners ("NBCE"), an organization which developes and administers national chiropractic examinations. All states use the NBCE examination in some way in determining whether to license applicants to practice chiropractic. The directors of NBCE are selected through a combination vote/appointment process controlled by FCLB. Through threats of antitrust litigation, Sherman successfully averted the efforts of ACA, CCE and FCLB in 1978 to get NBCE to permit only graduates of CCE accredited schools to take the national chiropractic exam. However, CCE was successful in getting NBCE to allow only faculty members of CCE approved schools to submit proposed examination questions.

In the wake of ACA's, CCE's and FCLB's successful campaign to make

diagnosis a fundamental aspect of chiropractic training, the fortunes of anti-diagnostic chiropractic colleges have declined. The enrollment of Plaintiff Sherman College has not grown at a time when enrollment at pro-diagnostic institutions is increasing. Sherman's graduates can become licensed chiropractors in only 11 states.

Plaintiffs' basic contention at trial was that Defendants ACA, CCE, and NBCE conspired with the FCLB and various state licensing boards to restrict Plaintiffs' ability to compete within the chiropractic profession. The restriction allegedly occurred through control of access to chiropractic accreditation, examination, and licensing. Plaintiff Sherman College seeks to collect damages

equal to three times the net revenues it contends it has lost as the result of Defendants' alleged antitrust violations. Plaintiff SCASA presented no proof of damages. Both Sherman College and SCASA seek injunctive relief against future violations of the antitrust laws.

Defendants denied that there was any conspiracy or improper restriction. Secondly, they argued that any actions taken by them which will better educate the chiropractic profession and promote better health care for chiropractic patients. Defendants also contended that any actual harm to Plaintiffs occurred as a result of the independent actions of state legislative or administrative bodies and as a result of protected lobbying activity, and therefore cannot serve as the basis for an antitrust suit

against Defendants. Defendants dispute Sherman College's claimed damages, contending that they were unduly speculative.

Conclusions of Law

The court makes the following conclusions of law:

The antitrust laws are concerned with protecting competition, not competitors. Alameda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343, 354 (5th Cir.), cert. denied, 449 U.S. 870 (1980). It is therefore critical to identify the consumer interests which are at stake. This requires identification of the product and those who consume it. In the instant case, a lack of clarity exists because Plaintiffs have not identified what product has been the object of

Defendants' alleged anti-competitve activities.

Nonetheless, the court will analyze Plaintiffs' claims from the standpoint of two possible products: chiropractic education and chiropractic health care services. Most of Plaintiffs' evidence appears to have been addressed to restriction or regulation of chiropractic education. It is this restriction, the court concludes, that has had the most direct impact on Sherman's continued growth as a chiropractic college.

Looking at the case in this way, the consumers of chiropractic education are those students who aspire to attend or who do attend chiropractic colleges. The evidence showed that within the United States there are presently about seventeen chiropractic colleges, two of

which (including Sherman College) adhere to the anti-diagnostic philosophy; the others are all pro-diagnostic. The court will assume that these chiropractic colleges compete with each other to attact and hold tuition-paying students.

Because Plaintiffs have presented no evidence of diminished competition in the chiropractic education market, it is critical to determine whether Plaintiffs' claim should be evaluated under the rule of reason or rather, under the "per se" rule. If the per se rule applies, then Plaintiffs need not demonstrate, by quantifiable evidence, that competition in a relevant market has been diminished. NCAA v. Board of Regents, __U.S.__,104 S.Ct. 2948, 2960-62 (1984). On the other hand, if a rule of reason analysis is appropriate, then Plaintiffs' failure to

prove actual anti-competitive effect in a relevant market is fatal to their case. Jefferson Parish Hospital Dist. No. 2 v. Hyde, __U.S.__,104 S.Ct. 1551, 1567-8 (1984).

The per se rule is appropriately applied where the nature of Defendants' activities is inherently anti-competitive and without redeeming societal value. Broadcast Music v. CBS, 441 U.S. 1, 8-10 (1979), but cf Arizona v. Maricopa Medical Society, 457 U.S. 332 (1982) (emphasizing need to limit inquiry to nature of arrangement between defendants). A case involving a concerted refusal to deal does not automatically invoke application of the per se rule. Northwest Wholesale Stationers, Petitioner, v. Pacific Stationery and Printing Company,

__U.S.__,105 S.Ct. 2613 (1985).

The court concludes after consideration that Plaintiffs have failed to make the threshold showing necessary to invoke application of the per se rule. The evidence showed that the number of schools of chiropractic has increased from nine schools in 1971 to seventeen schools today. Those schools of chiropractic which offer a pro-diagnostic course of study offer courses in diagnostic procedure in addition to the basic chiropractic education courses. Regulation of curriculum is an activity which is inherently appropriate for an accrediting body. The court will not assume that extra courses in diagnosis are valueless to a student of chiropractic. The court concludes, therefore, that any restraint imposed by

Defendants' alleged anti-competitive activities may not be evaluated under the per se rule. Accordingly, Plaintiffs' failure to prove actual diminution of competition is fatal to their claim, assuming that the relevant product is chiropractic education.

This action might also be viewed from the standpoint of the patient public as consumers of chiropractic services. In an indirect sense, Sherman College is a supplier of these services in that it produces practitioners who ultimately supply the service. Plaintiffs' argument is necessarily that graduates of anti-diagnostic colleges provide chiropractic services different in kind (and cost) than those provided by graduates of the pro-diagnostic colleges. Thus, Plaintiffs' argument is that the

interests of the consumer public are impaired when it is denied access to "straight" or anti-diagnostic chiropractors. The specter raised by Plaintiffs is that the public will be bilked by having to pay for diagnostic procedures which cannot be properly evaluated except by medical doctors. They point out that where diagnosis results in a reference to a medical doctor, that any diagnostic procedure will surely be repeated, resulting in a double charge to the patient. In cases where no referral is made because the chiropractor concludes that there is no problem, Plaintiffs argue there is danger in the patient's relying on such diagnosis. With no alternative access to chiropractors who do not perform diagnostic tests, Plaintiffs argue,

consumers will be forced to accept diagnostic services from chiropractors which they might not otherwise choose to accept. Hence, Plainiffs argue that the anti-competitive design of Defendants' activities is so clear that no actual proof of diminished competition is necessary.

Nonetheless, after consideration the court declines to apply the per se rule in this case. Antitrust cases involving the impact of professional educational standards on the consumer public are more appropriately analyzed under the rule of reason See Wilk v. AMA, 719 F.2d 207, 221-2 (7th Cir. 1983). Professions are different in certain respects from commercial businesses. National Society of Professional Engineers v. United States, 435 U.S. 679, 696 (1978);

Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89, n.17 (1975); Wilk, 719 F.2d at 221-2. Restrictions on access by imposition of educational and training requirements and a degree of self-regulation are definitional aspects of the term "profession." See, AMA v. United States, 130 F.2d 233, 246-48 (D.C. Cir. 1942). While a profession certainly could undertake a regulatory measure which would disserve the public interest, the general presumption is that the public interest is served by the promotion of enhanced education and training requirements. Secondly, there is danger in a court's presuming without evidence that the effects of higher educational standards will be adverse to the consumer public. The matter of what training is relevant and appropriate in a

given profession is not likely susceptible to intelligent use of facial presumptions. In this case, therefore, the court will not presume that education in diagnostic procedures lacks any possible relevance to quality chiropractic care.

Plaintiffs have further argued that even if a rule of reason applies, they are entitled to prevail. However, the court finds that the evidence does not preponderate in favor of a finding of unreasonable anti-competitive effect. There is no evidence in the record as to what impact the increased educational requirements for chiropractors has had or likely will have on the nature and cost of chiropractic services. The record does not reflect what type of diagnostic procedures are actually being performed

by chiropractors. It is unclear whether chiropractors as a group have enough power in the patient market to deprive patients of the right to choose not to receive diagnostic services. Finally, the court is unwilling to hold in the absence of evidence that the public interest is prejudiced by the use of any diagnostic procedures by chiropractors.

Plaintiffs' claims also fail for another reason. As previously noted, those states which have excluded graduates of anti-diagnostic institutions from becoming licensed chiropractors have done so either by legislative or administrative act. Defendants' activities in persuading these official state bodies to so act are immunized from liability under the Noerr-Pennington doctrine and under the related immunity

established for state action in the Parker v. Brown doctrine. Though certain exceptions to these immunity doctrines have been recognized by the court, no exception applies under the facts of the instant case.

The Noerr-Pennington doctrine establishes an immunity from antitrust liability for genuine political lobbying of governmental officials. In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), a group of railroads conducted a misleading political campaign in Pennsylvania to gain passage of laws that would limit trucks' use of roads for long hauling freight. The Supreme Court held that such conduct was beyond the scope of the Sherman Act:

> The Sherman Act does not prohibit two or more persons

> from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to the law that would produce a restraint or a monopoly.

365 U.S. at 136. The Court was particularly concerned with potential infringement of the First Amendment right to petition:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would..deprive the goverment of a valuable source of information and, at the same time, deprive people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139. The Sherman Act thus regulates only "business activity," not "political activity." Id. at 137.

In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the

Supreme Court reaffirmed the Noerr principal. In Pennington, the large coal companies and the United Mine Workers had successfully persuaded the Secretary of Labor to set a high minimum wage for TVA projects in order to drive smaller coal companies out of the market. The Court held this conduct to be outside the reach of the Sherman Act:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a boader scheme itself violative of the Sherman Act.

381 U.S. at 670.

It is clear in this case that Defendants engaged in political lobbying when they persuaded state legislators and administrative boards to bar graduates of anti-diagnostic colleges from licensure.

In Noerr, however, the Court noted that there may be instances where the political activity "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144. The "sham exception" was clarified in California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972). The California Motor Transport defendants allegedly conspired to oppose all applications for operating rights filed by their competitors. The Court held that the Noerr-Pennington doctrine did not apply in that instance, because

> "...The allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to

> adjudicatory tribunals and so to usurp that decisionmaking process.

404 U.S. at 512.

The Court therefore concluded that otherwise valid petitioning activity may be subject to antitrust scrutiny where a "pattern of baseless, repetitive claims" emerges which "leads the fact finder to conclude that the administrative and judicial processes have been abused." 404 U.S. at 513.

In this case, the record fails to disclose a pattern of baseless claims by Defendants before the licensing boards which could support a conclusion that the administrative process was abused. In fact, it is from Defendant's success before the state boards that Plaintiffs claim injury to themselves. Thus, Plaintiffs must rely on their claim that

the licensing boards themselves were members of the conspiracy through the FCLB, thereby rendering Plaintiffs' access to those agencies meaningless and Defendants' activities unprotected.

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court specifically reserved the question of the applicability of the Sherman Act to the case of "the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." Id. at 351. In United Mine Workers v. Pennington, the Court noted that no antitrust damages could be recovered for "the act of a public official who is not claimed to be a co-conspirator." 365 U.S. at 671.

The Court again noted the existence of a public co-conspirator exception in

California Motor Transport v. Trucking Unlimited, supra, stating: "Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." 404 U.S. at 513. In support of this proposition, the Court cited Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) and Harman v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964).

In Continental Ore, the Court found no antitrust immunity for private companies' dealings with a purchasing agent of the Canadian government, where the government agent was alleged to be a co-conspirator in the scheme. 370 U.S. at 706-707. In Harman, the Ninth Circuit held that Noerr did not necessarily bar antitrust liability for the defendants' joint efforts to influence the Attorney

General of Arizona, in pursuit of a monopoly on commercial banking, where the Attorney General had allegedly acted as a participating conspirator in the scheme. 339 F.2d at 566.

More recently, the Fifth Circuit upheld the trial court's application of the public co-conspirator exception in Affiliated Capital Corporation v. City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc), affirming 519 F.Supp. 991 (S.D. Tex. 1981), petition for cert. filed sub nom. Gulf Coast Cable Television Company v. Affiliated Capital Corporation, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984). An unsuccessful applicant for a cable television franchise in Houston had brought suit alleging that the successful applicants and certain officials of the city had conspired in

the award of the cable franchises. The jury found that such a conspiracy existed. The trial court then held that the Noerr-Pennington doctrine was inapplicable under the public co-conspirator exception. 519 F.Supp. at 1016-23. The Court of Appeals affirmed, stating that "numerous examples of official involvement in the conspiracy abound," and that "the actions of the mayor and city council indicate a 'vigorous involvement in orchestrating certain aspects of the conspiracy.'" 735 F.2d at 1567.

The public co-conspirator exception to the Noerr-Pennington doctrine has been critized by certain courts and commentators. In Metro Cable Company v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975), the Seventh Circuit refused

to recognize such an exception on the grounds that "such a rule would in practice abrogate the Noerr doctrine." 516 F.2d at 230. The court in Metro Cable did not appear to consider whether a secret conspiracy might completely subvert the policy making process, but instead expressed the fear that any member of a governmental body who simply agreed to support defendants' position would thereby become a "co-conspirator." 516 F.2d at 230.

The Eighth Circuit has also refused to rely on the public co-conspirator exception, noting that it has been subject to criticism. See Fisrt American Title Company v. South Dakota Land Title Association, 714 F.2d 1439, 1446 (8th Cir. 1983), cert. denied, 104 U.S. 709 (1984); Westborough Mall, Inc.

v. City of Cape Girardeau, 693 F.2d 733, 746 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983). Professor Fischel has argued in a widely noted article that "in most cases the co-conspirator exception is unworkable and should not be recognized." Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U.Chi.L.R. 80, 115 (1977).

The Third Circuit, however, has recognized the public co-conspirator exception. In Duke & Company, Inc. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975), the Court of Appeals reversed the district court's dismissal of the complaint, holding in part that the Noerr-Pennington doctrine did not shield defendants from antitrust liability:

> Both Noerr and Pennington involved suits against private parties who had allegedly conspired to influence governmental action. In neither case was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anti-competitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the Noerr-Pennington doctrine is inapplicable.

Id. at 1282 (emphasis in original).

Despite this broad language in the Duke opinion, some courts have distinguished Duke on the grounds that it involved alleged misconduct on the part of governmental agencies acting in a proprietary or procurement mode, rather than as a policy making body. First American Title Company, 714 F.2d at 1446. In this case, the state chiropractic licensing boards were clearly acting as

regulatory or policy making bodies, and not as quasi-commercial entities.

There is not precedent in the Eleventh Circuit which expressly considers the public co-conspirator exception. The case outside his circuit which applies the exception to facts most closely resembling this case is Federal Prescription Service, Inc. v. American Pharmaceutical Association, 663 F.2d 253 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982).

In Federal Prescription, a mail order pharmacy brought an antitrust action against the American Pharmaceutical Association ("American"), a national association of pharmacists, alleging that American had conspired with other trade organizations to restrain the plaintiff's mail order prescription

service. Among the alleged co-conspirators were the Iowa Board of Pharmacy Examiners, the National Association of Boards of Pharmacy, and various state pharmaceutical associations associated with American.

The district court found that these organizations had participated in a conspiracy with American to restrain the budding mail order pharmacy industry. The trial court focused on the relationships among the conspirators and on their concerted efforts to suppress the mail order pharmacists.

For example, the National Association of Boards of Pharmacy was found to have participated in the conspiracy by adopting American's resolutions opposing mail order drug distribution and drug advertising and by

sending copies of these to all of its members. The National Association is made up of the members of the state pharmaceutical licensing boards, and plays much the same role in the pharmaceutical profession as the FCLB does in the chiropractic profession. The court also found that the National Association had cooperated in setting up a conference "to determine what steps should be taken to oppose mail order drug distribution." 484 F. Supp. at 1203. At that meeting, "all state boards were asked to use every legal method to oppose the establishment of mail order houses." Id.

The court also found the Iowa Board of Pharmacy Examiners to have been a co-conspirator. The Iowa Board is a governmental body empowered to license

and regulate the practice of pharmacy in the state of Iowa. The members of the board are selected by the governor from a list compiled by the Iowa Pharmaceutical Association, an organization affiliated with American and subject to its Code of Ethics.

The trial court found that the Iowa Board had undertaken a number of unlawful actions against Federal. These findings were summarized in the opinion of the D.C. Circuit:

> The Board first denied Federal's license application, granting it only after being told by the Iowa Attorney General that state law did not prevent issuance of a pharmacy license to a mail order house. Then, in 1964, the Board delayed the grant of Federal's change of address license. The Board also imposed burdensome inspection conditions on Federal, and cooperated with pharmaceutical associations in Iowa and Nebraska in preparing forged prescriptions to be sent

> to Federal. In 1965, on the basis of these filled prescriptions, the Board revoked Federal's pharmacy license, but Federal succeeded in Iowa state court in having the revocation annuled. In 1968 the Board attempted to seize Federal's inventory pursuant to a search warrant, but withdrew the warrant after Federal filed suit to prevent the search and before any seizure was affected. In 1970 the Board withheld Federal's annual relicensing. In 1973 the Board induced the state to seek to have Federal enjoined from filling out of state prescriptions, but the action was dismissed and te Iowa Supreme Court affirmed the dismissal. Finally, in 1966, the Board denied Federal's request to be certified as a suitable employer of pharmacist interns. The reason for the denial, the court found, was that Federal did not belong to the Iowa Pharmaceutical Association.

663 F.2d at 259 (footnotes omitted).

Although the trial court found that the co-conspirators had engaged in a group boycott, the court also found some

of their actions to be beyond the coverage of the Sherman Act under the Noerr-Pennington doctrine. However, the court concluded form the Iowa Board's actions against Federal that the Board's administrative processes had been abused through a conspiracy among American, the Iowa and Nebraska state pharmaceutical associations, and the Board members themselves. American was therefore held liable for the Board's actions under the co-conspirator exception.

On appeal, the Court of Appeals reviewed the evidence and reversed the trial court's finding of conspiracy between American and the state boards. The Court of Appeals therefore concluded that the co-conspirator exception to Noerr was inapplicable, while expressing doubt about the doctrine's validity:

American Telephone & Telegraph, 708 F.2d 1081, 1155 (7th Cir. 1983). This court need not actually determine whether the co-conspirator exception should be recognized, because the court finds that the evidence is insufficient to support its application.

Plaintiff's argument for a conspiracy between the various state chiropractic licensing boards and Defendants is based on their relationship through the Federation of Chiropractic Licensing Boards. Under the FCLB bylaws, all members of chiropractic licensing boards in the state and territories of the U.S. are eligible to become active members of the Federation. Each board becomes a "member board" by paying dues, and the board as a whole has one vote at every meeting of FCLB. The bylaws states

[sic] that the members of each board shall have no vote separate and apart from their board. Any member board may also send a qualified representative to FCLB annual meetings to participate in the deliberations.

The FCLB is managed by a five person executive board, one member of which is selected from each of five geographic districts. The representatives of the member boards vote for director by district at the annual meetings of the FCLB. The president and vice president of the Federation are elected annually by secret ballot; the secretary an treasurer are then appointed.

Resolutions for the Federation's consideration are routinely presented at the February annual meetings and voted upon by the representatives of the member

state licensing boards. However, the evidence shows that the 1974 resolution urging the state boards to pass CCE requirements was adopted at a September 29 meeting of the Executive Board and officers of the FCLB, not at an annual meeting. See Plaintiff Exhibit No. 30.

There is nothing in the FCLB bylaws to indicate that either type of resolution is in any sense "binding" on the member boards. Although certain CCE supporters characterized the resolutions as "pledges" or "commitments" on the part of the boards or board members, this appears to have merely a rhetorical device, and not a reference to an actual obligation. Instead, the testimony as a whole indicates that such resolutions operate as recommendations from the Federation to its member boards with

> It seems doubtful that the existence of a public co-conspirator would explain any result more satisfactorily than one of the more established exceptions to the Noerr doctrine....

663 F.2d at 264, n.11.

The appeals court also found that the evidence of the Iowa Board's "unusually aggressive stance against mail order pharmacy," 663 F.2d at 267, was insufficient to support an inference of conspiracy with American. The court went on to uphold the trial court's other applications of the Noerr-Pennington doctrine.

In this case, the actions of CCE in relation to the state licensing boards are difficult to classify. The burden lies with Plaintiffs to establish that an exception to the Noerr-Pennington doctrine applies. MCI Communications v.

respect to those particular matters of chiropractic policy.

Plaintiffs' theory as to how the state licensing boards became co-conspirators through the FCLB is not completely clear. Plaintiffs' proposed findings of fact suggest at one point that it is only the members of state boards who support the 1974 FCLB resolution who have joined the conspiracy. Plaintiffs' Proposed Findings of Fact 278. However, as noted above, the state boards themselves did not vote on that resolution. Futhermore, the evidence fails to identify which states voted in favor of any other resolutions which Plaintiffs find restrictive. Elsewhere in the pleadings and at trial, Plaintiffs took the position that the licensing boards' mere

membership in the FCLB sufficiently implicates them in the alleged effort to restrain the anti-diagnostic faction.

The D.C. Circuit considered virtually an identical situtation in Federal Prescription, supra. State pharmaceutical board members automatically became members of the National Association of Boards of Pharmacy, and delegates from those state boards determined the policies of the National Association. Those policies included asking "all state boards...to use every legal method to oppose the establishment of mail order houses." 663 F.2d at 258. Furthermore, many state boards are made up of members of the state pharmaceutical associations, who have a dominant voice in determining the policy of the American Pharmaceutical

Association. Finally, American apparently boasted that sixteen state boards had responded to its request that cease and desist orders be issued against mail order pharmacies. Id. at 265.

The Court of Appeals held as a matter of law that this evidence failed to show that the state board members had participated in a conspiracy with American. The court stated:

> First, as to American's communications to the state boards, we decline to assign probative value to the fact that some state boards responded favorably...It would make a nullity of Noerr to hold the state board to be a co-conspirator, and the petitioning activity directed at it thus unprotected, on the basis that the petitioning was successful. That a public official is persuaded by the entreaty of a lobbyist does not make him the lobbyist's co-conspirator.

663 F.2d at 265.

For similar reasons, the Federal Prescription court refused to treat the evidence of overlapping membership as probative of conspiracy. The court stated:

> Mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations, much less in a conspiracy between those associations in yet another association.

Id. at 265. (citation omitted). The court also refused to impose liability against American on the basis of a "membership ratification" theory, and rejected the district court's findings that the Iowa Board's aggressive stance against mail order pharmacy was evidence of an unlawful conspiracy with American. The court stated:

> The behavior of the Iowa Board in this case is not of the kind that could only make sense in

> the context of the behavior of others; rather, it can be persuasively explained by the exercise of rational, independent judgment.

663 F.2d at 267.

The D.C. Circuit thus emphasized that proof of a conspiracy with a state agency requires that the evidence show more than just successful lobbying by the defendants and common membership in professional associations. The opinion in Federal Prescription indicates that the evidence must show true complicity on the part of the governmental body or bodies for the co-conspirator exception to apply. This conclusion is consistent with the general rule in this circuit that exceptions to the Noerr-Pennington doctrine must be construed narrowly. Mid-Texas Communication v. A.T. & T., 615 F.2d 1372, 1384 (5th Cir. 1980).

The connection between the actions of the FCLB and the state licensing boards is too tenuous to give rise to an inference of unlawful agreement. Although the state boards are obviously not wholly independent of the FCLB, the evidence fails to reveal any evidence of interaction between the state licensing boards or their members, on the one hand, and the FCLB and other alleged conspirators, on the other hand, which went beyond petitioning through appropriate channels. As the Federal Prescription court stated:

> A different case would result were it shown that state board members were bribed by American, or met in an unlawful fashion with its officers, or otherwise induced by American, by means other than legitimate lobbying and publicity, to take action against mail order houses. Evidence of this sort does not appear on the record.

663 F.2d at 266 (emphasis in original).

The co-conspirator exception is therefore inapplicable in this case. Defendants' appearances and other communications to the state chiropractic licensing boards thus qualify as protected petitioning activity, and may not serve as the basis for antitrust liability.

The court therefore finds that Plaintiffs have failed to establish a violation by Defendants of §1 of the Sherman Act. For the reasons set forth above, the court also finds that Plaintiffs have failed to establish that Defendants monopolized or conspired to monopolize any relevant chiropractic market in violation of §2 of the Act. The court therefore DIRECTS that judgment be entered in favor of Defendants The

Council on Chiropractic Education, Inc. and the National Board of Chiropractic Examiners.

SO ORDERED, this 9th day of January, 1986.

Oridna D. Evans
United States District Judge

FOOTNOTES 1 THROUGH 9

1 No evidence was adduced at trial regarding the claims of Plaintiffs Sukovitch and Kudlas, who apparently are graduates of Sherman College and practicing chiropractors. The motion to dismiss of Defendant American Chiropractic Association was granted at the close of Plaintiff's evidence. Judgment was entered in favor of Dr. Williams in a separate order entered April 16, 1985.

2 In 1974, CCE secured recognition as a nationally recognized accrediting agency by the United States Office of Education ("USOE"), the predecessor to the present Department of Education. CCE was determined to be a "reliable authority as to the quality of training offered" by educational institutions. See 20 U.S.C. §1141(a). The principal purpose of federal recognition is to establish a mechanism for screening schools for participation in federal aid programs. See 34 C.F.R. §603.1. CCE's recognition was renewed in 1975, 1979 and 1982, and will be up fo renewal again in 1986.

In 1979, Sherman College challenged the USOE's renewal of CCE's recognition on the grounds that CCE failed to represent the profession as a whole. The renewal was subsequently upheld by the United States District Court for the District of Columbia. See Sherman College of Straight Chiropractic v. United States Commissioner of Education, 493 F.Supp.

976 (D.D.C. 1980). CCE was also approved as an accrediting agency by the Council on Post Secondary Accreditation ("COPA") in 1976. COPA is a private, nonprofit association of accrediting agencies and national higher educational associations, which endeavors to promote quality in the accreditation process by reviewing and approving accrediting agencies. COPA renewed CCE's approval in 1982.

3 Despite its rejection by CCE, Sherman is clearly a substantial educational institution, dedicated to giving its students a quality chiropractic education within the parameters of its chiropractic philosophy. The court also found Sherman's founder and president, Dr. Thomas A. Gelardi, to be a person of high intelligence and integrity.

Sherman College has been fully accredited by the Southern Association of Colleges and Schools, a regional accrediting agency, since December of 1984. Sherman also has candidate status with Plaintiff SCASA, the Straight Chiropractic Academic Standards Association, Inc. Although accreditation with these organizations increases the prestige of Sherman's graduates to become licensed chiropractors because of the regulatory choices made by the state licensing boards. (See discussion in text at pp. 4-5, infra).

SCASA is an accrediting agency formed in 1978, with Sherman College and Pennsylvania College of Straight

Chiropractic (formerly Adio Institute) as founding members. SCASA has not made application to the USOE or to COPA for recognition.

SCASA has sought recognition as an accrediting agency for chiropractic colleges from a number of states. It has received recognition as of today only from the District of Columbia. CCE testified against SCASA at several state hearings on approval of SCASA, including New Hampshire, South Carolina and the District of Columbia.

Both USOE and COPA will entertain applications from more than one accrediting agency in a particular professional field. COPA currently recognizes two accrediting agencies in legal education, as well as two accrediting agencies in the field of medical assistance and medical technology. The evidence indicated that dual recognition for both CCE and SCASA would be unlikely but it is possible.

4 Plaintiffs contend FCLB conspired with Defendants but FCLB is not a Defendant in this action.

5 For example, Dr. Vern R. Webster was vice president of the FCLB from 1972 through 1977, and president from 1977 through 1979. He was also a director of the NBCE from 1975 through 1979, and has occupied that position sine 1981 as well. Furthermore, Dr. Webster was a member of the Commission on Accreditation of the CCE from approximately December of 1978

through February of 1981.

Dr. James A. Mertz served as vice president of the FCLB from 1974 to 1975, and as president from 1975 through 1976. Dr. Mertz was vice president of the CCE in 1976, and president in 1977 and 1978. He also served as a member of the Commission on Accreditation of the CCE from July of 1974 through December of 1982, serving as chairman of the Commission the last two years. While president of the FCLB, Dr. Mertz also served as a director on the NBCE.

6 NBCE points out that this request was initiated by the members of certain state chiropractic licensing boards. They threatened to stop using the NBCE exam for licensure purposes unless graduates of anti-diagnostic schools were denied permission to take the exam. This fact is evidence which shows that at least some chiropractic licensing boards were actively involved in assisting the pro-diagnostic group.

7 The parties did not address the issue of whether the administration of general diagnostic tests by chiropractors would or does violate scope-of-practice limitations in the various states.

8 Sherman College is presently one of two anti-diagnostic chiropractic colleges in the United States.

9 The Ninth Circuit later declined to follow Harman in Sun Valley Disposal Co. v. Silver State Disposal Co., 420

F.2d 341, 342 (9th Cir. 1969). See also Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 229-30 (7th Cir. 1975).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., WILLIAM SUKOVITCH and MICHAEL KUDLAS	)	
vs.	)	CIVIL NO. C81-1767
AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS	)	

ORDER

This antitrust action was tried without a jury in March of 1985. On March 26, 1985, the court granted the motion of Defendant American Chiropractic Associatin, Inc. ("ACA") to dismiss under Fed.R.Civ.P. 41(b), finding that upon the facts and the law Plaintiffs had shown no right to relief. This order shall constitute the written findings required

by Rule 41(b).

For the general background of this case, the court adopts the findings of fact set forth in the court's order entered January 9, 1986. in which the court found in favor of Defendants The Council on Chiropractic Education and National Board of Chiropractic Examiners. As to the ACA, the court finds that Plaintiffs failed to present sufficient evidence to give rise to an inference of anti-competitive intent on ACA's part. The court finds that a more appropriate inference from the evidence presented is that ACA, acting as a trade association for the chiropractic profession, undertook activities to further the perceived best interests of the profession and its members.

Furthermore, the court adopts for

the purposes of this order the conclusions of law set forth in the court's January 9, 1986 order. Plaintiffs failed to prove that ACA's activities diminished competition in a relevant chiropractic market, which is an essential component of their antitrust claim under a rule of reason analysis. Order of January 9, pp. 8-13. ACA's activities in persuading the state boards of chiropractic to exclude gradutes of anti-diagnostic institutions from becoming licensed chiropractors are also immunized from antitrust liability under the Noerr-Pennington doctrine. Order of January 9, pp. 13-28.

The court therefore DIRECTS that the judgment be entered in favor of Defendant American Chiropractic Association, Inc.

SO ORDERED, this 16th day of

January, 1986.

ORINDA D. EVANS
UNITED STATES
DISTRICT COURTHOUSE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOCKET NO. C81-1767A
NAME OF JUDGE OR MAGISTRATE
HONORABLE ORINDA D. EVANS

CASE TITLE: SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,WILLIAM SUKOVITCH, MICHAEL J. KUDLAS

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS & SID E. WILLIAMS

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERD AND ADJUDGED

That the plaintiffs, SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS

ASSOCIATION, INC. WILLIAM SUKOVITCH, MICHAEL J. KUDLAS, take nothing, that the action be dismissed and that defendants, AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS & SID E. WILLIAMS, RECOVER from the plaintiffs ther costs of action.*****

FILED AND ENTERED
IN CLERK'S OFFICE
JANUARY 9, 1986
LUTHER D. THOMAS, Clerk

By: Diane Gaylor
Deputy Clerk

Clerk	Date
Luther D. Thomas	Jan. 9, 1986

(By) Deputy Clerk
Diane Gaylor

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-8226

D.C. Docket No. 81-1767

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., a Pennsylvania Corporation,

Plaintiffs-Appellants,

versus

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior District Judge.

JUDGMENT

This cause came on to be heard on

the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Clerk, U.S. Court of Appeals

Eleventh Circuit

By: Pam Holloway
Dupty Clerk
Atlanta, Georgia

ISSUED AS MANDATE: JUNE 22, 1987

Entered: March 27, 1987
For the Court: Miguel J. Cortez, Clerk

By: Jean Leonard
Dupty Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-8226

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., a Pennsylvania Corporation,

Plaintiffs-Appellants,

versus

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING
(May 8, 1987)

BEFORE: TJOFLAT and HILL, Circuit Judges, and Lynne* Senior District Judge.
PER CURIAM:

The petition(s) for rehearing filed by Sherman College of Straight Chiropractic, et. al., is denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

_____
*Honorable Seybourn H. Lynne, Senior, U.s. District Judge for the Northern District of Alabama, sitting by designation. REHG-4/(Rev. 9/85)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-8226

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC; STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC., a Pennsylvania Corporation,

Plaintiffs-Appellants,

versus

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, and SID E. WILLIAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 27, 11 Cir. 1987, ___F.2d___).

(May 18, 1987)

BEFORE: TJOFLAT and HILL, Circuit Judges, and Lynne* Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

*Honorable Seybourn H. Lynne, Senior, U.S. District Judge for the Northern District of Alabama, sitting by designation. REHG-6 (Rev. 6/82)